Supreme Court, U.S.
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In The
Supreme Court of the United States

Shari M. Hicks,
Petitioner,

v.

Leroy's Jewelers, Inc.; Sterling, Inc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

May a federal court prior to a trial on the issues supply material facts that are not contained in the pleadings, depositions, admissions or answers to interrogatories to decide the legal issues raised in a motion for summary judgment?

May an employer under the federal Family and Medical Leave Act ("FMLA") involuntarily place an employee on maternity leave?

PARTIES TO THE PROCEEDINGS

Petitioner

Shari Hicks is the Petitioner and has no corporate affiliations.

Respondent

The Respondent is Leroy's Jewelers, Inc.; Sterling, Inc. Leroy's Jewelers, Inc. is a subsidiary of Sterling, Inc.

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The Order denying rehearing by the United States Court of Appeals for the Sixth Circuit in Hicks v. LeRoy's Jewelers, Inc. Sterling, Inc., Case No. 98-6596 is unpublished and is set forth in the Appendix hereto (App. E at 34a).

The Per Curiam opinion by the United States Court of Appeals for the Sixth Circuit in Hicks v. Leroy's Jewelers, Inc.; Sterling Inc. Case No. 98-6596 is unpublished, and is set forth in the Appendix hereto (App. A at 1a).

The district court Memorandum Opinion and Order in Hicks v. Leroy's Jewelers, Inc.; Sterling Inc., Civil Action No. 3:97-512-S (W.D.Ky. 1998) dated February 11, 1998 is unpublished and is set forth in the Appendix hereto (App. D at 27a).

The district court Memorandum Opinion and Order in Hicks v. Leroy's Jewelers, Inc.; Sterling Inc., Civil Action No. 3:97-512-S (W.D.Ky. 1998) dated April 3, 1998 is unpublished and is set forth in the Appendix hereto (App. C at 21a).

The district court Memorandum Opinion and Order is set out in Hicks v. Leroy's Jewelers, Inc.; Sterling Inc. , Civil Action No. 3:97-512-S (W.D.Ky. 1998) dated October 22, 1998 is unpublished and is set forth in the Appendix hereto (App. B at 14a).

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") was entered on July 17, 2000. The Court of Appeals denied a timely petition for rehearing on August 22, 2000. This petition for writ of certiorari is filed ninety days from that date 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

STATUTORY PROVISIONS INVOLVED

Family Medical Leave Act
29 U.S.C.A. § 2601

The entire text of 29 U.S.C. § 2601 is set forth in the Appendix hereto (App. I at 60a).

Family Medical Leave Act
29 U.S.C.A. § 2612

The entire text of 29 U.S.C. § 2612 is set forth in the Appendix hereto (App. I at 62a)

Family Medical Leave Act
29 U.S.C.A. §2615

The entire text of 29 U.S.C.A. § 2615 is set forth in the Appendix hereto (App. I at 72a).

Family Medical Leave Act
29 C.F.R. § 825.200

The entire text of 29 C.F.R. § 825.200 is set forth in the Appendix hereto (App. H at 48a).

Family and Medical Leave Act
29 C.F.R. §825.207

The entire text of 29 C.F.R. §825.207 is set forth in the Appendix hereto (App. H at 52a).

Family and Medical Leave Act
29 C.F.R. §825.114

The entire text of 29 C.F.R. § 825.114 is set forth in the Appendix hereto (App. H at 44a).

Family and Medical Leave Act
29 C.R.F. § 825.220(a) and (b)

The entire text of 29 C.F.R. § 825.220(a) and (b) is set forth in the Appendix hereto (App. H at 57a).

Family Medical Leave Act
29 C.F.R. § 825.214

The entire text of 29 C.F.R. § 825.214 is set forth in the Appendix hereto (App. H at 56a).

STATEMENT OF THE CASE

This is an action arising out of Respondent's termination of Petitioner's employment following the birth of

a child. Petitioner was unable to return to work at the time appointed by Respondent because of complications suffered as a result of childbirth. Respondent designated Hicks on FMLA leave as of August 8, 1995 (App. A at 3a). Petitioner claims that her original agreement with Respondent was for her leave to begin when her baby was born (App. F at 36a).

Petitioner filed an action in state court, alleging Respondent had interfered with her rights under the FMLA (App. G at 39a). Respondent removed the proceeding to federal court and filed an answer. Prior to any discovery Respondent filed a motion for summary judgment. The district court granted summary judgment in favor of Respondent (App. D 27a) stating in its Memorandum Opinion there was no dispute as to material facts and since there was no evidence that Respondent had coerced Petitioner to begin her leave early, there was no interference with Petitioner's rights as provided by the FMLA.

Petitioner then filed a motion to Alter, Amend and Reconsider. The district court granted the motion but entered an Order that discovery would be limited to the narrow issue whether Petitioner "voluntarily took medical leave on August 8, 1995, whether she ratified the leave by voluntarily signing a leave form after the leave began, or whether she was required by her employer to begin the leave on that date." (App. C at 26a) .

Respondent filed another motion for summary judgment. In its Memorandum Opinion the district court opined, "it is irrelevant whether [Petitioner] requested to be placed on FMLA leave or whether [Respondent] characterized her leave as FMLA after she failed to return to work. Under the FMLA, the employer may involuntarily place its employees on FMLA leave." (App. B at 17a). From this

Order dismissing with prejudice and granting summary judgment to Respondent, Petitioner appealed to the Court of Appeals.

The Court of Appeals held, "The district court erred in granting summary judgment to Sterling on the basis that Hick's hospital stay automatically qualified her for FMLA leave." (App. A at 8a) However, the court did not decide the issue as to whether the Respondent could place Hicks on involuntary leave, saying, "We need not, however, address the scope or validity of Sterling's right to place Hicks on "involuntary" FMLA leave because Hick's failure to return to work within 12 weeks of even her proposed leave date precludes recovery under the Act." (App. A at 11a).

WHY THE WRIT SHOULD BE GRANTED

I. FEDERAL COURTS MAY NOT SUPPLY FACTS FROM DOCUMENTS NOT INCLUDED IN THOSE SET OUT IN FRCP 56 (c).

FRCP 56(c) provides, "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The verified complaint (App. G at 39a) and an affidavit of plaintiff filed in this proceeding (App. F 36a) contain Petitioner's version of the facts.

Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 106 S. Ct. 2505 (1986) sets out the standards for federal courts

when determining the materiality of facts in motions for summary judgment. This court said there,

> "At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As Adickes, supra, and Cities Service, supra, indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. (Citation omitted). If the evidence is merely colorable, (citation omitted), or is not significantly probative, (citation omitted) summary judgment may be granted." at 249.

The Court of Appeals acknowledged that there were genuine issues of fact but failed to address altogether the issue as to whether FMLA allows an employer involuntarily to place an employee on FMLA leave (App. A at 11a). In an unwarranted extension of the guidelines laid out in Anderson, supra the Court of Appeals has supplied "facts" which are contrary to Petitioner's version of the facts in order to reach its decision.

If the Petitioner's leave had started on September 5, 1995, the date her baby was born, her leave would have ended twelve weeks thereafter, on or about November 28, 1995. However, her "failure to return to work within twelve weeks of even her proposed leave date" (App. A at 11a) was due to the fact she was terminated on or about November 14, 1995. This was an intervening cause and is the interference with Petitioner's rights under FMLA of which she complains. Respondent's actions precluded her from returning to work.

The case of Haschmann v. Time Warner, 151 F.3d 591 (7th Cir. 1998) involves a woman who was, among other things, terminated for trying to exercise her rights under FMLA. The Haschmann court found her termination was in violation of FMLA. *See also* Cline v. Wal-Mart Stores, Inc., 144 F.3d 294 (4th Cir. 1998). While courts have held an employer may terminate employment when an employee does not return to work after the twelve weeks of qualifying FMLA leave have been exhausted, the undersigned is unaware of any cases in which a court has held that if an employer, having misapprehended the starting date for qualifying FMLA leave, terminates employment twelve weeks thereafter, it is somehow saved from penalty under the act if it can show, after the fact, that perhaps the employee may not have been able to come back at the end of the proper twelve-week period.

This case is distinguishable from Cehrs v. Northeast Ohio Alzheimer's Research Center, 155 F. 3rd 775 (6th Cir. 1998) cited by the Court of Appeals (App. A at 13a). In Cehrs the employer terminated the employee after the twelve weeks of FMLA leave had expired but arguably backed up the effective termination date. In the instant case there is no evidence the Respondent waited until after the twelve weeks that Petitioner claims she was entitled to to terminate her employment.

The Court of Appeals bases its factual findings that Petitioner, "did not contact Sterling to substantiate her absence or explain when she would be able to return" (App. A at 4a) and that "she was unable to return to work within 12 weeks of the later start date" (App. A at 12a) on excerpts from transcripts of hearings before the Kentucky Unemployment Commission which were filed as appendices

to memoranda of Respondent in support of its motions for summary judgment.

> As argued in Petitioner's brief, the proceedings before the Unemployment Commission do not, under Kentucky law, collaterally estop Petitioner from raising the same factual issues in this case as were raised there. Covington Board of Education v. Gray, 806 S.W.2d 400 (Ky. App. 1991). Assuming *arguendo* the Court of Appeals acted properly in referring to the transcript a review of same indicates summary judgment is inappropriate. In the transcript the hearing officer states,
>
> > "[Y]ou testified, and I'll ask you if it is accurate, in the first hearing that you spoke to Ms. Hawkins. That you advised her on the 30th, let's see, that you wouldn't be able to return to work by the 30th because of complications with your delivery."
>
> He further asks,
>
> > "Did you speak with Ms. Hawkins any more after--after you, uh, called her and she referred you to the home office and you talked to Cheryl?"
>
> He goes on to ask,
>
> > "So, is it safe to say then there was no further communication after November 13th, after you spoke with Ms., uh,

with Ms. Kovarik and she told you that they were preparing papers for you to be dismissed?"

The referee in his initial decision made the following finding:

> "The claimant phoned Susan Hawkins three times in October, explaining her complications, the last being around October 25, 1995. Ms. Hawkins advised claimant there would be no problem if she had to extend her leave provided she produced a note from her doctor when released."

The state court judge in his Opinion and Order overruling the Unemployment Commission says,

> "While the Commission concluded from *inconsistent testimony* that Ms. Hicks failed to notify her employer of her absence, there was no evidence that it was other than inadvertent." (emphasis added)

Petitioner suggests there is more than a scintilla of evidence in the record that she was in communication with her employer.

Petitioner was not terminated for misconduct. The opinion of the state court judge settles this issue. Her termination was purely and simply as a result of her not

returning to work when her employer arbitrarily stated her FMLA leave was over.

Countering the insertion of the Unemployment Commission transcript Petitioner attached copies of her medical records for the pertinent time period as an exhibit to a Memorandum. They show the following:

(1) On October 18, 1995, she went for her six week post-partum checkup but could not be checked because she was still bleeding. She was advised to come back "when the bleeding stops".

(2) She went back to the doctor on November 17, 1995, some nine days before she would have been due back had her leave started on September 5, 1995. This date is three days, more or less, after she had been terminated. The doctor's note states in part, "Urinalysis and cultures are done today. If anything shows up, she will be called and treated, *Otherwise, she doesn't need to return for a year.*" (emphasis added).

(3) The next note in the chart evidences the doctor's office called on November 29, 1995. On November 30, 1995, the patient called and scheduled an appointment for December 4, 1995. Petitioner postponed that appointment in order to take her mother to the hospital. It must be remembered that she had already been terminated by Respondent.

It is important to note that there is nothing in the doctor's records that indicates Petitioner was unable to go to work before December 6, 1995. That happens to be the last doctor's appointment she had for this particular pregnancy.

She was called in because of "*moderate inflammation of the cervix*". (emphasis added).

In the initial unemployment hearing before the referee Petitioner was asked,

> "Q2 When were you actually released by your doctor to return to work?
>
> A Uh, it was the 6th.
>
> Q3 December 6th?
>
> A Yeah, when I actually could get another appointment to get in there."

There is also a recollection of the Petitioner about this last doctor's appointment contained in her affidavit. There she says,

> "Since she had already been terminated, there was no need to ask her doctor if she could return to work immediately. When she went for her appointment with her doctor on December 6, 1995, she was informed the tests came back negative and that everything was ok."

Lastly, the doctor's notes, which have been quoted above, were contemporaneous, whereas, Petitioner's recollections were somewhat removed in time. While her recollections could be used to impeach her testimony in a trial, the doctor's notes are independent evidence that she was cleared to go to work on November 17, 1995. For purposes

of a motion for summary judgment the court should take the facts in the light most favorable to the non-movant.

In Covington, supra, the court said,

> "[T]he profound differences between unemployment proceedings and those found in a court of law lead us to conclude that the application of binding estoppel would simply be inappropriate." (p. 402)
>
> At the heart of this issue is the doctrine of collateral estoppel, also known as the "issue preclusion" doctrine. (p. 402. See Donovan v. Thames, 105 F.3d 291 (6th Cir. 1997))
>
> Kentucky's unemployment compensation system is set up to expeditiously award temporary, monetary benefits to a worker after loss of his or her job. In order to receive such benefits, the worker must prove (or the employer, conversely, disprove) that he or she was involuntarily separated from employment without good cause on the employer's part (p. 402).
>
> Second, we do not believe that the procedures utilized in the unemployment system either grant any party a full, true opportunity to litigate issues, or even encourage any meaningful participation in the process. As we stated, the unemployment system is set up to quickly determine benefit eligibility status. Hearings are generally informal and expeditious. The rules of evidence are

> relaxed. This, of course, often leads to the inclusion of evidence which might otherwise be inadmissible in a court of law. McClanahan v. Remington Freight Lines, 517 N.E.2d 390, 395 (Ind. 1988). Too, the amounts involved are often minimal, quite different than the substantial damages which might be sought in a civil court of law." (pp. 402-3).

The hearing officer presumably did not have a copy of Petitioner's medical records, and Petitioner was speaking from memory. Her primary purpose at the hearing was refuting Respondent's contention that she was not entitled to unemployment benefits and not in the finer points of when her benefits were to begin. From reading the excerpt from the transcript, it is not clear whether the question the hearing officer was asking Petitioner was fully understood by her. A jury could reasonably find that she answered a different question from the one that was asked.

Overlooking these questions of material fact the Court of Appeals granted Respondent summary judgment. In doing so, the Court of Appeals interjected facts not in the pleadings.

II. EMPLOYERS MAY NOT INVOLUNTARILY PLACE AN EMPLOYEE ON MATERNITY LEAVE UNDER THE FMLA.

By finding that Petitioner would not have been able to return to work at the end of her twelve-week period the Court of Appeals sidestepped the central issue in this case -whether an employer may involuntarily place an employee on leave.

It cited two unpublished district court opinions which held that an employer may involuntarily place an employee on involuntary FMLA leave without elaborating further on this issue as it applies to Petitioner. Harvender v. Norton Company, 1997 WL 793085 (N.D.N.Y, December 15, 1997) (App. A at 10a) and Love v. City of Dallas, 1997 WL 278126 (N.D. Tex. May 14, 1997) (lbid at 10 a FN. 7). These cases have been followed in Moss v. Formosa Plastics Corp., 99 F. Supp. 2d 737 (M.D. La 2000).

The cases cited by the Court of Appeals address serious medical conditions. While the holdings of these cases may be applied to "serious illness" cases, they are inappropriate for uncomplicated pregnancy situations. One would like to think that pregnancy leave would occur around the date of the child's birth and not at the whim of the employer. The Court of Appeals recognized that there was a genuine issue of fact as to whether Petitioner had a "serious medical condition" which would trigger FMLA leave. (App. A at 7a)

This issue is well framed in The Pregnancy Discrimination Act; Legitimating Discrimination Against Pregnant Women in the Workforce, 50 Me. L. Rev. 225, 247 (1998):

> Pregnant women are trapped by these stereotypes of who they are. Because our culture normalizes negative stereotypes of pregnant women, it is easy for us to accept that pregnant employees will compare unfavorably with nonpregnant ones. Because we tend to separate the realms of work and family, negative stereotypes of pregnant women that make them appear unfit for the workplace ring

true to us. The question is, how can we think beyond the stereotypes that have historically controlled our approaches to pregnancy in the workplace?

One possible solution to the problems that pregnant women face at work is to invoke the terms of the Family and Medical Leave Act (FMLA). [FN127] The FMLA provides for up to twelve weeks of unpaid leave for eligible employees because of either the birth of a child or because of a serious health condition that makes the employee unable to perform on the job. [FN 128] Pregnancy- related complications count as a serious health condition. [FN129] If the need for the leave is due to a serious health condition, the leave can even be taken intermittently. [FN130] The FMLA will undoubtedly be helpful to many pregnant women, including those who are required to take short periods of bedrest because of spotting or cramping and those who must occasionally miss time at work for other pregnancy-related reasons.

The FMLA also has serious limitations for pregnant women. First, many pregnant women cannot afford to take advantage of the FMLA because it mandates only unpaid leave. Second, the FMLA only provides a leave of twelve weeks. This will not be long enough for women whose problems continue throughout the forty weeks of pregnancy. Third, the FMLA is of no assistance to pregnant women who do not want to take a leave, but simply

want to be able to take a walk periodically around their workplace or to eat small snacks at their desks. In this way, it reinforces the stereotyped image of pregnant women as *248 unfit for work. The lesson of the FMLA is that if the woman's pregnancy is causing her to have difficulty with her usual work assignments, her remedy is to leave the workplace.

Finally, and most significantly, the FMLA is subject to the possibility of being misused against pregnant women instead of as a means of protecting them. In the recent case of Harvender v. Norton Co., [FN 13 1] the district court granted the employer's motion for summary judgment against a plaintiff who claimed that the employer had violated the FMLA by forcing her to take leave under the Act when she did not want it. [FN132] When the plaintiff first informed her employer that she was pregnant, the employer asked her to obtain a note from her doctor indicating that she should be protected from exposure to hazardous chemicals since her job as a lab technician exposed her to such chemicals approximately sixty percent of the time. The plaintiff procured the requested note. Claiming that there was no light duty work available, the employer then placed the plaintiff on FMLA leave although the plaintiff never requested it and did not want it.

The court upheld the employer's action on the grounds that plaintiffs pregnancy was clearly a

> "serious health condition" under the FMLA and that as a result of it she could not work with chemicals. The FMLA did not guarantee her alternative employment. Therefore, the court reasoned, she could be put on FMLA leave. [FN133]

This is an important issue which needs to be settled by this Court to carry out the aims of Congress when it passed FMLA. One of the primary aims of FMLA was to allow workers to have time off for the birth of a child. This aim can be and has in the instant case been thwarted by employers who arbitrarily decide when a woman shall begin her maternity leave.

CONCLUSION

This Court should review this case because the Court of Appeals for the Sixth Circuit has improperly expanded the role of appellate courts into the area of fact finding in cases involving motions for summary judgment. This Court should also settle the issue as to whether and under what circumstances an employer may involuntarily place an employee on FMLA. For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/_____
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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed July 17, 2000]

No. 98-6596

SHARI M. HICKS,
Plaintiff-Appellant,

v.

LEROY'S JEWELERS, INC.; STERLING, INC.,
Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Kentucky

Before RYAN and BOGGS, Circuit Judges, and DUGGAN, District Judge.*

* The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

PER CURIAM.

OPINION

Appellant Shari Hicks, a former employee of the defendant, Sterling, Inc. d/b/a LeRoy's Jewelers, challenges the district court's order affirming Sterling's decisions to place Hicks on Family and Medical Leave Act (FMLA) leave as of August 8, 1995, and to terminate her when she failed to return to work after her authorized absence. For the reasons set forth below, we affirm the district court's order granting summary judgment for Sterling.

I

Hicks began working for Sterling as an office clerk in Louisville, Kentucky in July 1994. Approximately six months later, in December 1994, Hicks discovered that she was pregnant. In June 1995, Hicks informed her supervisor, Susan Hawkins, that she wanted to take 12 weeks of maternity leave after the baby was born. Pursuant to Hicks's request, Hawkins obtained, and Hicks signed, a "Family Medical Leave of Absence Advance Notice and Leave Agreement" (FMLA Agreement) indicating that Hicks would begin her leave on August 28, 1995, the day she was expected to give birth. According to Hicks, the beginning date for the leave was followed by a parenthetical insertion stating that the leave would actually begin after the baby was born.[1]

---

[1] A copy of this agreement is not included in the record.

On August 8, 1995, Hicks developed a kidney infection. She was absent from work and spent one night in the hospital pursuant to her doctor's orders. According to Hicks, she called Hawkins the following morning to apprise Sterling of her condition, at which point Hawkins asked her if she would like to start her maternity leave as of the date of her hospital stay. Hicks alleges that she told Hawkins that she did not want to begin her maternity leave at that time because she would be able to return to work the following day. Hicks did not, however, submit any medical documentation stating that she would be able to return to work following her release from the hospital, and did not return to work. Based on the information Hicks gave Hawkins concerning her medical condition at the time she was hospitalized, Sterling designated Hicks as on FMLA leave as of August 8, 1995.

Hicks gave birth on September 4, 1995, and on September 11, 1995, Sterling sent her a letter notifying her that she was on approved FMLA leave. On October 7, 1995, Hicks met with Hawkins and signed what Hicks alleges to be a second FMLA Agreement stating that her twelve weeks of FMLA leave began on August 8, 1995, (the day of her hospital stay), and ended on October 31, 1995. Although Hicks signed the second agreement listing August 8 as the first day of her leave, Hicks contends that she never agreed to that start date and alleges that, at the time she signed the agreement, the sections specifying the start and end dates were blank.[2]

---

[2] Neither party has produced a copy of the original FMLA agreement or a copy of the second agreement bearing Hicks's signature but not the start and end dates for her FMLA leave.

Because of complications resulting from childbirth, Hicks could not return to work on October 31, the final day of her approved leave. By letter dated November 15, 1995, Sterling notified Hicks of its intention to process her resignation because she failed to return to work on October 31 and did not contact Sterling to substantiate her absence or explain when she would be able to return. Hicks never responded to Sterling's letter and did not return to work. On November 15, 1995, Hicks applied for unemployment benefits, which she subsequently received.

In July 1997, Hicks filed a complaint against Sterling in state court alleging that Sterling's decision to place her on leave as of August 8, 1995, and subsequently to terminate her, violated the FMLA. Sterling removed the case to federal district court, which, after 180 days of discovery, granted Sterling's motion for summary judgment. Hicks then filed a motion to alter, amend or reconsider the order granting summary judgment, and on April 3, 1998, the district court set aside its ruling and ordered an additional 90 days of discovery on the limited issue of whether Hicks voluntarily took FMLA leave beginning on August 8, 1995. On June 1, 1998, the district court extended the discovery deadline by another 90 days, partially to accommodate a discovery request that Hicks served on Sterling on May 18, 1998. On June 16, 1998, Sterling responded to Hicks's request, and discovery closed on August 31, 1998.

On September 1, 1998, Sterling re-filed its motion for summary judgment, which Hicks opposed. After considering briefs from both parties, the district court again granted summary judgment to Sterling and dismissed the action with prejudice. In the memorandum accompanying the summary

judgment order, the district court explained that it was irrelevant whether Hicks voluntarily began her FMLA leave on August 8, 1995, because the Act permits employers to place statutorily eligible employees on leave whether or not such employees request time off. The district court thus held that, because Sterling's decision to place Hicks on FMLA leave as of August 8, 1995, was based on a qualifying absence (her overnight hospital stay), it did not violate Hicks's rights under the statute even if she would have preferred to begin her leave on a later date. Hicks timely appealed the district court's order to this court. On appeal, Hicks contends that, contrary to the district court's conclusion, genuine issues of material fact exist as to whether her August 8 hospital stay was a "qualifying absence" that allowed Sterling to place her on FMLA leave four weeks before her baby was born.

II

This court reviews *de novo* the district court's grant of summary judgment for Sterling. *See Smith v. Ameritech*, 129 F .3d 857, 863 (6th Cir.1997); *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir.1996), *cert. denied*, 117 S.Ct. 683 (1997).

Qualifying Absence Under the FMLA

The Family and Medical Leave Act (FMLA) was enacted to "balance the demands of the workplace with the needs of families, . . . to entitle employees to take reasonable leave for medical reasons . . . in a manner that accommodates the legitimate interests of employers" 29 U.S.C. § 2601(b). To this end, the FMLA's implementing regulations provide that, subject to medical certification:

> (a) An eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:
>
> (1) The birth of the employee's son or daughter, and to care for the newborn child;
>
> ...
>
> (4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job.

29 C.F.R. § 825.200(a)(1)-(4). The regulations, in pertinent part, define "serious health condition" as:

> (a) [A]n illness, injury, impairment, or physical or mental condition that involves:
>
> (1) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, . . .
>
> (2) Continuing treatment by a healthcare provider. . . includ[ing] any one or more of the following:
>
> (i) A period of incapacity (i.e. inability to work, attend school or perform other regular daily activities due to the serious

> health condition, treatment therefore, or recovery therefrom) of more than three consecutive calendar days. . . .
>
> (ii) Any period of incapacity due to pregnancy, or for prenatal care.

29 C.F.R. § 825.114(a).

A hotly disputed issue in this case is whether Hicks's August 8, 1995, hospitalization constitutes a "qualifying absence" under the FMLA, entitling her employer to place her on FMLA leave for the entire period between August 8 and September 4. The district court granted Sterling's motion for summary judgment because it concluded that Hicks's hospitalization was a qualifying absence and that, as a result, Sterling had authority to place Hicks on FMLA leave as of the date of her hospital stay. Hicks argues that summary judgment was inappropriate because a genuine issue of material fact exists as to whether her hospitalization resulted from a temporary illness that qualified her only for paid sick leave, or from a "serious medical condition" that qualified her for FMLA leave.

It is undisputed that Hicks's kidney infection required an overnight stay in the hospital and that her hospital stay raised the question whether she was suffering from a serious health condition that would qualify her for FMLA leave. *See* 29 C.F.R. § 825.114(a)(1) (defining a "serious health condition" (which qualifies an employee for FMLA leave) as a "physical or mental condition that involves . . . [i]npatient care (i.e., an overnight stay) in a hospital"); *Bauer v. Varity*

Dayton-Walther Corp., 118 F.3d 1109, 1111 (6th Cir.1997) (applying § 825.114(a)(1)). However, an affidavit or verified complaint alone may be sufficient to create a genuine issue of material fact with respect to an element of proof, *see Williams v. Browman*, 981 F.2d 901, 904-05 (6th Cir.1992), and Hicks clearly stated in her affidavit that she was able and willing to return to work after she was released from the hospital. The district court therefore erred in granting summary judgment to Sterling on the basis that Hicks's hospital stay automatically qualified her for FMLA leave.[3] We need not, however, remand on this issue because Hicks's failure to return to work within 12 weeks even of her proposed leave date precludes recovery under the FMLA. *See infra* pp. 9-10.

With respect to Hicks's claim for paid sick leave, it is true that the FMLA generally permits an eligible employee to choose to substitute paid leave (*e.g.*, sick leave) for unpaid FMLA leave. *See* 29 C.F.R. § 825.207(a).[4] However, even assuming that Hicks was entitled to receive sick pay for the

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[3] Given the statements in Hicks's affidavit, granting summary judgment to Sterling on the basis that she did not return to work after she was released from the hospital, *see* 29 C.F.R. § 825.114(a)(2)(i) (defining a "serious health condition" as one involving a "period of incapacity . . . *i.e.*, [an] inability to work . . . of more than three consecutive calendar days"), would also have been inappropriate.

[4] An employee does not, however, have a "right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan." 29 C.F.R. § 825.207(c).

duration of her hospital stay,[5] the regulations clearly provide that an employee's FMLA leave may run concurrently with paid medical or sick leave. *See* 29 C.F.R. § 825.207(d)(1). As a result, Sterling's decision to place Hicks on FMLA leave as of August 8, 1995, if a jury were to determine that Hicks was eligible for leave as of that date, would not have violated the FMLA even if she were entitled to paid sick leave for the period of her hospitalization because her hospital stay was a qualifying absence that rendered her eligible for leave under the Act.[6]

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[5] There is no evidence on record that Hicks's hospital stay would have been covered by Sterling's sick leave policy, or that Hicks received, or did not receive, sick pay for the days she was absent from work as a result of her kidney infection.

[6] Hicks asserts that Sterling violated the statute when it placed her on unpaid FMLA leave rather than paid sick leave following her August 8, 1995, hospitalization. In support of this claim, Hicks relies on the fact that the FMLA "prohibits interference with an employee's rights under the law," and specifically prohibits covered employers from "manipulat[ing]" employment situations to "avoid responsibilities under FMLA." 29 C.F.R. § 825.220(a); (b). However, even if Sterling "manipulated" the facts of Hicks's hospital stay to avoid paying for sick leave, such manipulation does not give rise to a cause of action under the FMLA. Section 825.220(b) of the FMLA's implementing regulations prohibits only "manipulation . . . to avoid responsibilities under [the] FMLA." 29 C.F.R. § 825.220(b) (emphasis added). Sterling's decision to manipulate the facts of Hicks's August 8 illness to avoid responsibilities under its own sick leave policy would not be actionable under the FMLA, though it might give rise to a contract claim.

Although Hicks apparently recognizes that, under the regulations, her hospital stay may have qualified her for FMLA leave in the absence of evidence that she was able to return to work upon her release, she argues that it was inappropriate for Sterling to place her on leave once she allegedly informed her supervisor that she did not wish to begin her leave at that time. In response, Sterling argues that, even if an eligible employee indicates that he or she does not want to be placed on leave, the employer is authorized by the statute to place that employee on leave as of the time he or she becomes eligible.

Some courts have interpreted the FMLA's implementing regulations as authorizing an employer to place an employee on FMLA leave "involuntarily," that is, even if the employee does not request such leave, as long as that employee is "eligible" for leave by virtue of having taken a qualified absence from work.[7] *See, e.g., Harvender v. Norton*

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[7] As this court observed in *Covucci v. Service Merchandise Co., Inc.*, 1999 WL 115531 (6th Cir., Feb. 8, 1999), under FMLA regulations "it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, based on information provided by the employee." *Id.* at *4 (quoting 29 C.F.R. § 825.208(a)(2) (1994) (interim regulation)). Thus, some courts have held that an employer may place an employee on FMLA leave even if the employee never requests such leave so long as the employer has evidence that the employee is suffering from a serious medical condition or other condition that qualifies the employee for leave under the Act. *See id.* at *5 (noting that under interim regulation 29 C.F.R. § 825.208(a)(1) (1994), an employee "need only provide the employer with a[n] FMLA-qualifying reason for leave"); *see also Love v. City of Dallas*, 1997

Company, 1997 WL 793085, at *7 (N.D.N.Y., Dec. 15, 1997) (finding that the defendant did not violate the plaintiff's rights by placing her on involuntary FMLA leave because her pregnancy constituted a qualifying condition for leave and "[n]owhere in the Act does it provide that FMLA leave must be granted only when the employee wishes it to be granted"). Of course, Sterling's decision to place Hicks on "involuntary" FMLA leave could not be upheld if it were determined that her hospital stay was not a qualifying absence under the Act because she was able, as stated in her affidavit, to return to work upon her release. We need not, however, address the scope or validity of Sterling's right to place Hicks on "involuntary" FMLA leave because Hicks's failure to return to work within 12 weeks of even her proposed leave date precludes recovery under the Act.

Hicks's Termination

The regulations accompanying the FMLA specifically address an employee's rights upon returning to work from a period of authorized FMLA leave:

> (a) On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent

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WL 278126,*6 (N.D.Tex. May 14, 1997) (concluding that "nothing in the [FMLA] prohibits an employer from [placing employees on involuntary leave]").

> benefits, pay, and other terms and conditions of employment.

29 C.F.R. § 825.214(a). However, the regulations also clearly state that an employee who cannot return to work at the end of the approved leave is not entitled to job restoration:

> (b) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA.

Id. § 825.214(b).

Hicks argues that the district court erred in holding that Sterling's decision to terminate her for failing to return to work on October 31, 1995, did not violate her rights under the FMLA. Hicks's argument fails, however, because an employee on approved FMLA leave has no right to job restoration under the Act if she fails to return to work twelve weeks after her leave began. *See* 29 C.F.R. § 825.214(b). Thus, even if, as Hicks contends, her FMLA leave should have begun on September 4, 1995, (the day her child was born), rather than on August 8 (the day she was hospitalized for her kidney infection), Sterling's decision to terminate her for failing to return to work would be valid because she was unable to return to work within 12 weeks of the later start date. Under the FMLA, an employee is entitled to 12 weeks of qualified leave per year. Given this, even if Hicks's leave began on September 4, it would have ended in the last week

of November, at least 10 days before her doctor certified her to return to work. The district court was therefore correct in granting Sterling's motion for summary judgment with respect to Hicks's wrongful termination claim. *See Cehrs*, 155 F.3d at 785 (holding that "[r]egardless" whether the leave date proposed by the plaintiff or by the employer applied, the employer did not violate the FMLA by terminating the plaintiff because she was "clearly unable to return to work within the period provided by the FMLA").

III

Although Hicks's affidavit raises a material issue of fact as to whether her hospital stay constituted a qualifying absence for purposes of beginning FMLA leave, we need not remand on this issue because Hicks's failure to return to work before December 6, 1995, precludes recovery under the Act. We therefore AFFIRM the district court's order granting summary judgment for Sterling.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[Filed October 22, 1998]

No. 3:97-512-S

SHARI M. HICKS
Plaintiff,

v.

LEROY'S JEWELERS, Inc., et al.
Defendants,

MEMORANDUM OPINION

This matter comes before the court on a motion for summary judgment by the defendant. The defendant refiled this motion after this court granted the plaintiff's motion to alter, amend or reconsider its previous order granting summary judgment in favor of the defendant and granted the parties additional time to refile summary judgment motions. In this case, the plaintiff claims that she was terminated from her employment in violation of the Family and Medical Leave Act ("FMLA"). For the reasons set forth below, the court will grant the defendant's motion for summary judgment.

FACTS

The plaintiff, Shari M. Hicks, began working for the defendant in July 1994. She had planned to take FMLA leave when her child was born in late August or early September. On August 8, 1995, Hicks informed the defendant that she was hospitalized for a kidney infection and could not work. Hicks now alleges that she desired and was able to return to work after two days and that she wanted to begin her FMLA leave when her child was born. However, Hicks did not return to work following her hospitalization. She gave birth on September 4, 1995. The defendant sent Hicks a letter dated September 11, 1995 notifying her that she was on approved FMLA leave. On October 7, 1995, Hicks signed a "Family and Medical Leave of Absence Advance Notice and Leave Agreement" which stated that her twelve weeks of leave would begin on August 8, 1995 and end on October 31, 1995. However, Hicks did not return to work on October 31, 1995 because of complications resulting from childbirth. Hicks failed to notify the defendant that she would not be returning.

By a letter dated November 15, 1995, the defendant notified Hicks of its intent to process her resignation for failure to return to work or to contact the defendant regarding when she would be able to return. Hicks never responded and never returned to work. On November 15, 1995, she applied for unemployment benefits which were eventually awarded.

DISCUSSION

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party's failure to establish an element of proof essential to his case and upon which he will bear the burden of proof at trial constitutes a failure to establish a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d. 265 (1986). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Under the FMLA, an employee is entitled to a total of twelve weeks of leave because of the birth of a child and/or because of a "serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. §2612(a)(1). It is unlawful for an employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. §2615(a)(1). "'Interfering with' the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." 29 C.F.R. §825.220(b). Before this court is the narrow issue of whether Hicks voluntarily took FMLA leave on August 8, 1995 or whether her employer requested that she begin her leave on that date and whether this constituted an interference with Hicks's rights under the FMLA.

Hicks argues that the defendant requested that she begin her FMLA leave on October 8, 1995, despite her desire and ability to return to work within two days and to begin her FMLA leave later, after her baby was born. Hicks admits that she signed a "Family and Medical Leave of Absence

Advance Notice and Leave Agreement" which stated that her twelve weeks of leave would begin on August 8, 1995 and end on October 31, 1995. However, Hicks argues that her signature on this form is not a ratification of leave on those dates because the form had blanks for the dates which were filled in later by the defendant.

It is irrelevant, however, whether Hicks voluntarily took her FMLA leave. The U.S. Department of Labor has issued several FMLA opinion letters which state that an employer may designate an employee's leave as FMLA leave despite the employee's wishes. In fact, it is the employer's responsibility to designate leave and to notify the employee of that designation. "The employee may not, however, bar the employer from designating any qualifying absence as FMLA leave." *See* 30 Op. FMLA 83 Opinion (1997); 24 Op. FMLA 68 (1996).

The defendant cites two federal district court opinions to support this proposition. In *Harvender v. Norton Co.*, 1997 WL 793085 (N.D.N.Y 1997), the court held that the rights established by the FMLA do not include the right to bring an action against an employer for placing an eligible employee on leave. The court reasoned that the FMLA does not state that leave must be granted only when the employee requests it. If an employee cannot perform an essential element of her job and, therefore, must be placed on leave, the employer is free to characterize that leave as FMLA leave if the employer so chooses. *Id.* at *7. Similarly, in *Love v. City of Dallas,* 1997 WL 278126 (N.D. Tex. 1997), the plaintiff claimed that her employer violated the FMLA by "involuntarily placing Plaintiffs on FMLA leave without request." *Id.* at *6. The court dismissed the plaintiff's claim,

reasoning that nothing in the FMLA prohibits an employer from involuntarily placing an employee on FMLA leave. Although this may constitute an adverse employment action for which the plaintiff may have a cause of action under another statute, it is not actionable under the FMLA. *Id.*

Therefore, the defendant correctly states that it is irrelevant whether Hicks voluntarily took FMLA leave on August 8, 1995 or whether the defendant requested that she begin her leave on that date. There is no indication that Hicks attempted to return to work or expressed a desire to do so after she recovered from her kidney infection and before the baby was born. Furthermore, at her unemployment hearing, Hicks stated that her leave began on August 8, 1995 and that she was unable to return to work until December 6, 1995. The defendant is not prohibited under the FMLA from placing Hicks, a qualified employee, on FMLA leave; its actions do not constitute an interference with Hicks's rights under the FMLA.

Thus, it is irrelevant whether Hicks requested to be placed on FMLA leave or whether the defendant characterized her leave as FMLA after she failed to return to work. Under the FMLA, the employer may involuntarily place its employees on FMLA leave. Therefore, this court will grant the defendant's motion for summary judgment by separate order.

This 22nd day of October, 1998.

/s/_____
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[Filed October 22, 1998]

No. 3:97-512-S

SHARI M. HICKS
Plaintiff,

v.

LEROY'S JEWELERS, Inc., et al.
Defendants,

ORDER

For the reasons stated in the memorandum opinion entered this date and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the motion of the defendant for summary judgment is **GRANTED**. The plaintiff's complaint is **DISMISSED** with prejudice. There being no just reason for delay, this is a final order.

IT IS SO ORDERED this 22nd day of October, 1998.

/s/
CHARLES R. SIMPSON, III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[Filed April 3, 1998]

No. 3:97-512-S

SHARI M. HICKS
Plaintiff,

v.

LEROY'S JEWELERS, Inc., et al.
Defendants,

MEMORANDUM OPINION

This matter is before the court on the motion of the plaintiff, Shari M. Hicks, to alter, amend and reconsider our order granting summary judgment to the defendant, Sterling, Inc., d/b/a LeRoy's Jewelers ("Sterling"). For the reasons set forth below, the court will grant the plaintiff's motion.

Under the Family and Medical Leave Act (FMLA), an employee is entitled to a total of twelve weeks of leave because of the birth of a child and/or because of a "serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C.

§2612(a)(1). The Act also entities the employee to restoration of her same position upon return from leave. 29 U.S.C. §2614(a)(1). However, "[i]f the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the .employee has nō right to restoration to another position under the FMLA." 29 C.F.R. §825.214(b).

The plaintiff states in Paragraph 5 of her complaint that she began her maternity leave on August 8, 1995, and that Sterling expected that she would return to work by the end of October 1995. In Paragraph 6, the plaintiff states that she "was unable to return to work by the end of October, 1995 because of excessive bleeding as a result of the childbirth." Therefore, Hicks admits that she received the twelve weeks of leave to which she was entitled under the FMLA. She also admits that she was unable to return to work at the end of the twelve weeks due to a serious health condition. She claims, rather, in Paragraph 9 of her complaint, that "her termination was in violation of the Family and Medical Leave Act and that her rights thereunder were interfered with." She bases this claim on the allegation that Sterling required her to take her maternity leave earlier than the date she gave birth.

As stated in the court's summary judgment opinion, in making a determination on a motion for summary judgment, a court is to view all facts and inferences in a light most favorable to the nonmoving party. *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941 (6th Cir. 1990). Under the FMLA, it is unlawful for an employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise,

any right provided under this subchapter." 29 U.S.C. §2615(a)(1). "'Interfering with' the exercise of an employee's rights would include, for example, not only refusing to authorize the FMLA leave, but discouraging an employee from using such leave." 29 C.F.R. §825.220(b).

Hicks has alleged that the defendant required her to begin her leave after her hospitalization for a kidney infection on August 8, 1995. She states that her employer required her to do so despite her ability to return to work the next day and her desire to begin the FMLA later, when the baby was actually born. For this reason, the court will set aside the previous ruling granting Sterling summary judgment and will allow the parties ninety (90) days for additional discovery on the issue of interference with rights provided under the FMLA. The discovery is to be conducted on the narrow issue of whether Hicks voluntarily took medical leave on August 8, 1995, whether she ratified the leave by voluntarily signing a leave form after the leave began, or whether she was required by her employer to begin the leave on that date. The parties are granted the ninety-day period with leave to refile motions for summary judgment within thirty (30) days thereafter.

For the reasons set forth above, the court will grant the plaintiff's motion to alter, amend and reconsider the previous order granting the summary judgment motion of the defendant, Sterling. The previous ruling will be set aside with the parties given ninety (90) days for additional discovery, as provided above. At the end of that time, the parties are granted leave to refile summary judgment motions within thirty (30) days. A separate order will be entered herein this date in accordance with this opinion.

This 3rd day of April, 1998.

/s/_____
CHARLES R. SIMPSON, III , CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[Filed April 3, 1998]

No. 3:97-512-S

SHARI M. HICKS
Plaintiff,

v.

LEROY'S JEWELERS, Inc., et al.
Defendants,

ORDER

Motion having been made by the plaintiff, Shari M. Hicks to alter, amend and reconsider this court's order granting summary judgment to the defendant, Sterling, Inc., d/b/a LeRoy's Jewelers, and for the reasons set forth in the memorandum opinion, and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that:

1. The plaintiff's motion is **GRANTED** and the court's previous ruling granting summary judgment to Sterling is hereby set aside.

2. The parties are allowed ninety (90) days in which to conduct discovery on the narrow issue of whether

Hicks voluntarily took FMLA leave from August 8, 1995 to October 31, 1995, or whether she was required to take the leave at that time by her employer.

3. At the end of the ninety (90) days, the parties will have thirty (30) days in which they are granted leave to refile summary judgment motions.

IT IS SO ORDERED this 3rd day of April, 1998.

/s/_____
CHARLES R. SIMPSON, III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[Filed February 11, 1998]

No. 3:97-512-S

SHARI M. HICKS
Plaintiff,

v.

LEROY'S JEWELERS, Inc., et al.
Defendants,

MEMORANDUM OPINION

This matter is before the court on the motion of the defendant, Sterling, Inc., d/b/a LeRoy's Jewelers ("Sterling"), for summary judgment. This case involves the plaintiff's claim that her termination by the defendant is a violation of the Family and Medical Leave Act (FMLA). For the reasons set forth below, the court will grant the defendant's motion.

FACTS

The parties do not dispute the material facts. Hicks began working for the defendant in July 1994. Beginning on

August 8, 1995, Hicks started her twelve-week maternity leave under the FMLA. Hicks signed a "Family and Medical Leave of Absence Advance Notice and Leave Agreement" on October 7, 1995. This form stated that the twelve weeks of leave would commence on August 8, 1995 with a return date of October 31, 1995.

Hicks did not return to work on October 31,1995 nor did she contact Sterling regarding her intent to return to work. Sterling attempted to contact Hicks on several occasions but never reached her. The defendant then sent Hicks a letter dated November 14, 1995, notifying Hicks of its intent to process her resignation because she had failed to return to work or to give them a date when she would be able to return. Hicks filed for unemployment benefits the next day.

The plaintiff admits in her complaint that she took her FMLA leave from August 8, 1995 to the end of October. She also states that she was unable to return to work by the end of October due to excessive bleeding as a result of childbirth. Hicks alleges that her termination was in violation of the FMLA and that Sterling interfered with her rights under that act.

DISCUSSION

In order to support a motion for summary judgment, a moving party must prove the absence of a genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L.Ed. 2d 265 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry

of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In deciding a summary judgment motion, a judge's role is not to weigh the evidence or determine its truth, but to determine if a genuine question of fact exists. *Id.* at 249. "[W]hether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250. In making these determinations, the court is to view all facts and inferences in a light most favorable to the nonmoving party. *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941 (6th Cir. 1990).

Under the FMLA, an eligible employee is entitled to a total of twelve weeks of leave during any twelve-month period because of the birth of a son or daughter and/or because of a "serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. §2612(a)(1). The employee is required to provide the employer with 30 days' notice, before the date of the leave is to begin, of her intention to take such leave. 29 U.S.C. §2612(e)(2)(B). On return from FMLA leave, the employee is entitled to be restored by the employer to the position of employment held by the employee when leave commenced or an equivalent position. 29 U.S.C. §2614(a)(1). However, "[i]f the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA." 29 C.F.R. §825.214(b).

It is undisputed both that the plaintiff took twelve weeks of leave from August 8, 1995 to October 30, 1995 and that she was unable to return as of October 31, 1995. There is no need to inquire whether the doctrine of collateral estoppel would bar Hicks from relitigating the issues of the length of her leave and her ability to return to work. Hicks has admitted in her complaint that she took twelve weeks of leave and that she was unable to return at the end of that time due to complications from childbirth. Under the FMLA, an employee is allowed a total of twelve weeks. Upon return to work, that employee is entitled to restoration of the same or an equivalent position. Because Hicks, by her own account, was unable to return at the end of her twelve weeks' leave, she was not entitled, to restoration of her position.

Hicks states that Sterling forced her to begin her leave on August 8, 1995, when she was hospitalized for a kidney infection. She states that she was able to return to work after two days; she did not give birth until September 4, 1995. She claims that another leave agreement form stated that her leave would begin when her child was born and run twelve weeks from that date. Hicks further argues that had she started her leave at a later date as requested, the twelve weeks would not have ended until November, when she was able to return to work.

Under the FMLA, it is unlawful for an employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. §2615(a)(1). "'Interfering with' the exercise of an employee's fights would include, for example, not only refusing to authorize the FMLA leave, but discouraging an employee from using such leave." 29 C.F.R. §825.220(b).

Interference also includes manipulation by an employer to avoid responsibilities, such as changing an employee's essential functions to preclude the taking of leave or reducing employees' hours to avoid their eligibility for leave. Id.

This court finds that no prohibited interference on the part of Sterling occurred. Even assuming that Hicks did not wish to begin her leave on August 8, 1995, there is no evidence that Sterling coerced her into leaving early. Sterling did not refuse to grant Hicks the twelve weeks' leave nor did it discourage her from doing so. Hicks voluntarily chose to sign the leave form which shows the August 8th date and has produced no other leave agreement indicating a different set of dates. Therefore, Hicks cannot support a claim of interference.

For the reasons set forth above, the court will grant Sterling's motion for summary judgment. A separate order will be entered herein this date in accordance with this opinion.

This 11th day of February, 1998.

/s/_____
CHARLES R. SIMPSON, III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[Filed February 11, 1998]

No. 3:97-512-S

SHARI M. HICKS
Plaintiff,

v.

LEROY'S JEWELERS, Inc., et al.
Defendants,

ORDER

Motion having been made by the defendant Sterling, Inc., d/b/a LeRoy's Jewelers, for summary judgment, and for the reasons set forth in the memorandum opinion entered herein this date, and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the defendant's motion for summary judgment is **GRANTED**. This court having dispensed with all claims in this case, this order is final and appealable.

IT IS SO ORDERED this 11th day of February, 1998

/s/_____
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed August 22, 2000]

No. 98-6596

SHARI M. HICKS,
Plaintiff-Appellant,

v.

LEROY'S JEWELERS, INC.; STERLING, INC.,
Defendants-Appellees.

ORDER

BEFORE: BOGGS and RYAN, Circuit Judges and DUGGAN, District Judge.*

Upon consideration of the petition for rehearing filed by the appellant,

* The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

[Dated October 17, 1997]

No. 3:97-CV-512-S

SHARI M. HICKS,
Plaintiff,

v.

LEROY'S JEWELERS, INC. and
STERLING, INC.,
Defendants.

AFFIDAVIT

Comes the affiant, Shari M. Hicks, Plaintiff herein and having first been duly sworn, states as follows:

1. Approximately three months before the due date of her child she informed her supervisor, Susan Hawkins that she would like to go on maternity leave beginning on the date of her child's birth. Ms. Hawkins sent to the home office for the "Family and Medical Leave of Absence Advance Notice and Leave Agreement". The commencement

date on that form was filled in as August 28, 1995 which was the affiant's due date. The return date was twelve weeks later. In parenthesis it was stated in that form that the beginning date would start on the actual birth date.

2. On or about August 8, 1995 the affiant missed a day of work because of a kidney infection, necessitating that she spend one night in the hospital.

3. When she called in to work on the following day, she was asked if she wanted to begin her maternity leave at that time, to which she replied "no".

4. Contrary to the wishes of the affiant the home office of her employer required that she begin her maternity leave on the same day that she missed due to the kidney infection, in spite of the fact that Plaintiff had recovered from her kidney infection and was able to return to work.

5. Her child, Tyler Hicks was born on Labor Day, September 4, 1995.

6. Following her supervisor's instructions, she called to tell them when the baby was born. She was instructed to come, in due course, and fill out a form. She was told that the purpose of this form was just to verify that she was planning to come back to work.

7. On or about October 7, 1995 the affiant went to her place of employment and was presented with a blank Family and Medical Leave of Absence Advance Notice and Leave Agreement which was she was asked to sign. It had not been filled in and she was not given a copy of same.

8. Affiant surmised that she had been terminated when she received her personal belongings from her employer's store. Upon telephoning the home office she was informed that a letter informing her of her termination was being processed.

9. Subsequent to her termination she had an appointment with her gynecologist on November 17, 1995 at which time she was informed that one of her tests was negative. She was advised by her doctor that he did not think that it was serious but it would require further testing.

10. Since she had already been terminated, there was no need for her to ask her doctor if she could return to work immediately. When she went for her appointment with her doctor on December 6, 1995 she was informed that tests came back negative and that everything was OK.

Further the affiant sayeth not.

/s/_____
Shari M. Hicks

Subscribed and sworn to before me by Shari M. Hicks this 17th day of October, 1997.

My commission expires: 5-30-2001

/s/_____
NOTARY PUBLIC

APPENDIX G

JEFFERSON CIRCUIT COURT
DIVISION TWO (2)

[Dated July 14, 1997]

No. 97CI03966

SHARI M. HICKS
7431 Candace Way
Louisville, Ky 40214
Plaintiff,

v.

LEROY'S JEWELERS, INC.
6801 Dixie Highway
Louisville, Ky 40258
Serve: CT Corporation System
Kentucky Home Life Bldg.
Louisville, Kentucky 40202

and

STERLING, INC.
Serve: Secretary of State
The Capitol
Frankfort, Ky 40601
Defendants.

COMPLAINT

Comes the Plaintiff, by counsel, and for her Complaint against the Defendants, states as follows:

1. She began working in the store of Defendant, LeRoy's Jewelers, Inc. (hereinafter, jointly and severally with Sterling Inc. "Employer") on or about July 5, 1994.

2. When Plaintiff discovered that she was pregnant in December, 1994 she informed employer that she was pregnant and that she would like to start her maternity leave after her baby was born. Under the terms of the Federal Family and Medical Leave Act, 29 USCS §§ 26.11 et seq. (the "Act"), Plaintiff was entitled to twelve weeks maternity leave.

3. When Plaintiff developed a kidney infection before the baby was born, she was required for her health and the health of the unborn child to be absent from work.

4. Instead of allowing Plaintiff to take medical leave Employer in contravention of the act required Plaintiff to begin her maternity leave coincidental with the onset of her kidney problem.

5. Plaintiff gave birth to her child on September 4, 1995, which would have meant that her maternity leave would have been through about November 27, 1995 had it begun at the baby's birth. However, since she left work on August 8, 1995 Employer was expecting that she would return to work from maternity leave by the end of October, 1995.

6. Plaintiff, however, was unable to return to work by the end of October, 1995 because of excessive bleeding as a result of the childbirth. Her condition was discussed with her managers who instructed her not to come back to work until she had a medical clearance.

7. Plaintiff went to the doctor towards the end of October and could not be examined because of the bleeding. An appointment was made for her to come back to the doctor on November 17, 1995.

8. When Plaintiff received her personal belongings from the store she called the home office of Sterling, Inc. and was told that her employment was being terminated because of lack of communication.

9. Plaintiff alleges that her termination was in violation of the Family and Medical Leave Act and that her rights thereunder were interfered with.

10. As a result thereof, she is entitled to all remedies available to her under said act as a result of the interference with her rights under the said act by the defendants, severally and collectively.

WHEREFORE, this Plaintiff demands as follows:

1. All damages to which she is entitled under said Act.

2. A trial by jury of all issues so triable.

3. Her costs herein expended including reasonable attorney's fees.

4. Any other relief to which she may appear to be entitled.

/s/_____
Terrence L. McCoy
Attorney for Plaintiff
3850 National City Tower
Louisville, KY 40202
584-4191

VERIFICATION

The Plaintiff under oath verifies that the allegations herein are true to the best of her knowledge.

/s/_____
Shari M. Hicks

STATE OF KENTUCKY)
) ss
COUNTY OF JEFFERSON)

Subscribed and sworn to before me this 14th day July, 1997 by Shari M. Hicks.

My commission expires: 5-30-2001.

/s/_____
NOTARY PUBLIC, STATE AT LARGE, KY

APPENDIX H

29 C. F. R. §§ 825.114, 825.200, 825.207, 825.220 & 825.214

CODE OF FEDERAL REGULATIONS
TITLE 29--LABOR
SUBTITLE B--REGULATIONS RELATING TO LABOR
CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR
SUBCHAPTER C--OTHER LAWS
PART 825--THE FAMILY AND MEDICAL LEAVE ACT OF 1993
SUBPART B--WHAT LEAVE IS AN EMPLOYEE ENTITLED TO TAKE UNDER THE FAMILY AND MEDICAL LEAVE ACT?

29 C.F.R. § 825.114

§ 825.114 What is a "serious health condition" entitling an employee to FMLA leave?

(a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

(1) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment

therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(2) Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(ii) Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(iv) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

(b) Treatment for purposes of paragraph (a) of this section includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

Under paragraph (a)(2)(i)(B), a regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(c) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(d) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand,

absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(e) Absences attributable to incapacity under paragraphs (a)(2) (ii) or (iii) qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

* * * *

29 C.F.R. § 825.200

§ 825.200 How much leave may an employee take?

(a) An eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and,

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job.

(b) An employer is permitted to choose any one of the following methods for determining the "12-month period" in which the 12 weeks of leave entitlement occurs:

(1) The calendar year;

(2) Any fixed 12-month "leave year," such as a fiscal year, a year required by State law, or a year starting on an employee's "anniversary" date;

(3) The 12-month period measured forward from the date any employee's first FMLA leave begins; or,

(4) A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave (except that such measure may not extend back before August 5, 1993).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12- month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time

FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the "rolling" 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 1994, four weeks beginning June 1, 1994, and four weeks beginning December 1, 1994, the employee would not be entitled to any additional leave until February 1, 1995. However, beginning on February 1, 1995, the employee would be entitled to four weeks of leave, on June 1 the employee would be entitled to an additional four weeks, etc.

(d)(1) Employers will be allowed to choose any one of the alternatives in paragraph (b) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements.

(2) An exception to this required uniformity would apply in the case of a multi-State employer who has eligible employees in a State which has a family and medical leave statute. The State may require a single method of determining the period during which use of the leave entitlement is measured. This method may conflict with the method chosen by the employer

to determine "any 12 months" for purposes of the Federal statute. The employer may comply with the State provision for all employees employed within that State, and uniformly use another method provided by this regulation for all other employees.

(e) If an employer fails to select one of the options in paragraph (b) of this section for measuring the 12-month period, the option that provides the most beneficial outcome for the employee will be used. The employer may subsequently select an option only by providing the 60-day notice to all employees of the option the employer intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employer may implement the selected option.

(f) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in § 825.205.

* * *

29 C.F.R. § 825.207

§ 825.207 Is FMLA leave paid or unpaid?

(a) Generally, FMLA leave is unpaid. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for FMLA leave.

(b) Where an employee has earned or accrued paid vacation, personal or family leave, that paid leave may be substituted for all or part of any (otherwise) unpaid FMLA leave relating to birth, placement of a child for adoption or foster care, or care for a spouse, child or parent who has a serious health condition. The term "family leave" as used in FMLA refers to paid leave provided by the employer covering the particular circumstances for which the employee seeks leave for either the birth of a child and to care for such child, placement of a child for adoption or foster care, or care for a spouse, child or parent with a serious health condition. For example, if the employer's leave plan allows use of family leave to care for a child but not for a parent, the employer is not required to allow accrued family leave to be substituted for FMLA leave used to care for a parent.

(c) Substitution of paid accrued vacation, personal, or medical/sick leave may be made for any (otherwise) unpaid FMLA leave needed to care for a family member or the employee's own serious health condition. Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employer's usual requirements for the

use of sick/medical leave. An employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave "in any situation" where the employer's uniform policy would not normally allow such paid leave. An employee, therefore, has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows paid leave to be used for that purpose. Similarly, an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan.

(d)(1) Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. If the requirements to qualify for payments pursuant to the employer's temporary disability plan are more stringent than those of FMLA, the employee must meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave.

(2) The Act provides that a serious health condition may result from injury to the employee "on or off" the job. If the employer designates the leave as FMLA leave in accordance with § 825.208, the employee's FMLA 12-week leave entitlement may run concurrently with a workers' compensation absence when the injury is one that meets the

criteria for a serious health condition. As the workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable. However, if the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a "light duty job" but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a "light duty job". As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave. See also §§ 825.210(f), 825.216(d), 825.220(d), 825.307(a)(1) and 825.702(d)(1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(e) Paid vacation or personal leave, including leave earned or accrued under plans allowing "paid time off," may be substituted, at either the employee's or the employer's option, for any qualified FMLA leave. No limitations may be placed by the employer on substitution of paid vacation or personal leave for these purposes.

(f) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan.

(g) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count

against the 12 weeks of FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 12 weeks of FMLA leave entitlement.

(h) When an employee or employer elects to substitute paid leave (of any type) for unpaid FMLA leave under circumstances permitted by these regulations, and the employer's procedural requirements for taking that kind of leave are less stringent than the requirements of FMLA (e.g., notice or certification requirements), only the less stringent requirements may be imposed. An employee who complies with an employer's less stringent leave plan requirements in such cases may not have leave for an FMLA purpose delayed or denied on the grounds that the employee has not complied with stricter requirements of FMLA. However, where accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employer's sick leave program. See §§ 825.302(g), 825.305(e) and 825.306(c).

(i) Section 7(o) of the Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the Act. There are limits to the amounts of hours of compensatory time an employee may accumulate depending upon whether the employee works in fire protection or law enforcement (480 hours) or elsewhere for a public agency (240 hours). Compensatory time off is not a

form of accrued paid leave that an employer may require the employee to substitute for unpaid FMLA leave. The employee may request to use his/her balance of compensatory time for an FMLA reason. If the employer permits the accrual to be used in compliance with regulations, 29 CFR 553.25, the absence which is paid from the employee's accrued compensatory time "account" may not be counted against the employee's FMLA leave entitlement.

* * * *

29 C.F.R. § 825.214

§ 825.214 What are an employee's rights on returning to work from FMLA leave?

(a) On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. See also § 825.106(e) for the obligations of joint employers.

(b) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations may be governed by the Americans with Disabilities Act (ADA). See § 825.702.

29 C.F.R. § 825.220

§ 825.220 How are employees protected who request leave or otherwise assert FMLA rights?

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has--

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;

(2) changing the essential functions of the job in order to preclude the taking of leave;

(3) reducing hours available to work in order to avoid employee eligibility.

(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example,

employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (see § 825.702(d)). In such a circumstance the employee's right to restoration to the same or anequivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of "light duty."

(e) Individuals, and not merely employees, are protected from retaliation for opposing (e.g., file a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

APPENDIX I

29 U.S.C.A. §§ 2601, 2612, 2614, & 2615

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 28--FAMILY AND MEDICAL LEAVE

29 U.S.C.A. § 2601

§ 2601. Findings and purposes

(a) Findings

Congress finds that--

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes

It is the purpose of this Act--

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring

generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

* * * *

29 U.S.C.A. § 2612

§ 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(2) Expiration of entitlement

The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12- month period beginning on the date of such birth or placement.

(b) Leave taken intermittently or on reduced leave schedule

(1) In general

Leave under subparagraph (A) or (B) of subsection (a)(1) of this section shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2) of this section, and section 2613(b)(5) of this title, leave under subparagraph (C) or (D) of subsection (a)(1) of this section may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken.

(2) Alternative position

If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of

subsection (a)(1) of this section, that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that--

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted

Except as provided in subsection (d) of this section, leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave

(1) Unpaid leave

If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this subchapter may be provided without compensation.

(2) Substitution of paid leave

(A) In general

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(e) Foreseeable leave

(1) Requirement of notice

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) of this section is foreseeable based on planned medical treatment, the employee--

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(f) Spouses employed by same employer

In any case in which a husband and wife entitled to leave under subsection (a) of this section are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken--

(1) under subparagraph (A) or (B) of subsection (a)(1) of this section; or

(2) to care for a sick parent under subparagraph (C) of such subsection.

(1) under subparagraph (A) or (B) of subsection (a)(1) of this section; or

(2) to care for a sick parent under subparagraph (C) of such subsection.

* * * *

29 U.S.C.A. § 2614

§ 2614. Employment and benefits protection

(a) Restoration to position

(1) In general

Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave--

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits

The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations

Nothing in this section shall be construed to entitle any restored employee to--

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification

As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction

Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section

2612 of this title to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees

(1) Denial of restoration

An employer may deny restoration under subsection (a) of this section to any eligible employee described in paragraph (2) if--

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees

An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits

(1) Coverage

Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of Title 26) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave

The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 2612 of this title if--

(A) the employee fails to return from leave under section 2612 of this title after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than--

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 2612(a)(1) of this title; or

(ii) other circumstances beyond the control of the employee.

(3) Certification

(A) Issuance

An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by--

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(C) of this title; or

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(D) of this title.

(B) Copy

The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification

(i) Leave due to serious health condition of employee

The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member

The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

* * * *

29 U.S.C.A. § 2615

§ 2615. Prohibited acts

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual--

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

Supreme Court, U.S.
FILED
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No. 00-891

IN THE

Supreme Court of the United States

SHARI M. HICKS,

Petitioner,

v.

LEROY'S JEWELERS, INC.; STERLING, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Should the Court review this case when the question the Petition presents is whether the courts below supplied facts and made erroneous factual findings in deciding a summary judgment motion?

Should the Court review this case when the question the Petition presents is whether under the federal Family and Medical Leave Act an employer may place an employee on leave given that the question is an uncontroverted principle which the lower court found unnecessary to address?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Sterling, Inc., d/b/a LeRoy's Jewelers, is an indirect wholly owned subsidiary of Signet Group plc. which is publicly traded on NASDAQ.

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COUNTER-STATEMENT OF THE CASE

This case involves a primary legal principle under the federal Family and Medical Leave Act of 1993 ("FMLA" or the "Act"), 29 U.S.C. § 2601, *et seq*. The principle is that as a matter of law under the FMLA, an employee is entitled to *only* a total of 12 weeks of leave in a 12 month period. Upon expiration of the 12 weeks of leave, if the employee cannot return to work due to the continuation of a serious health condition, the employee has no right to job restoration or to FMLA protection. 29 U.S.C. § 2612(a)(1); 29 C.F.R. § 825.214(b).

During her employment with Respondent Sterling, Inc. d/b/a LeRoy's Jewelers ("Sterling"), Petitioner Shari M. Hicks ("Hicks") received 12 weeks of FMLA leave, which began on August 8, 1995 and ended on October 31, 1995. Jt. App. 65-66, 74-75, 218-219.[1] When Hicks did not report to work or contact Sterling at the end of her leave, and after several attempts to contact Hicks, which were unsuccessful, Sterling terminated her employment effective November 14, 1995. Jt. App. 70-73, 78. In sworn testimony, Hicks admitted that she received 12 weeks of leave, and that she could not return to work at the end of her leave. Jt. App. 66, 13. As such, under the law Hicks was not entitled to job restoration or any FMLA protection.

As summarized below, the evidence of record demonstrates that Hicks received 12 weeks of leave and could not return to work at the end of her leave. In 1995, while employed by Sterling, Hicks was granted a leave under the

1. All citations to Jt. App. __ are references to the Joint Appendix filed in the United States Court of Appeals for the Sixth Circuit.

FMLA, which commenced on August 8, 1995 (when Hicks informed Sterling that she was hospitalized with a kidney infection) and ended on October 31, 1995. Jt. App. 12, 65-66, 74-75, 103, 218-219. Hicks received a letter dated September 11, 1995 from Sterling verifying that she was on an approved FMLA leave. Jt. App. 293. The letter listed a toll-free telephone number and informed Hicks to contact Sterling with any questions about her FMLA leave. Hicks also signed a "Family and Medical Leave of Absence Advance Notice and Leave Agreement," wherein she agreed to return to work on October 31, 1995. The Leave Agreement states that:

> . . . the rules of the FMLA provide that my leave of absence may not exceed 12 weeks. I understand that the job protection provided me expires after 12 weeks of leave.

The Leave Agreement signed by Hicks also states that:

> I understand that a breach of any of these terms may result in the reclassification of this leave as unauthorized, or not subject to the terms of the FMLA, and/or may result in disciplinary action, up to and including the termination of any continued employment.

Jt. App. 218-219.

When Hicks did not return to work on October 31, 1995, or contact Sterling with information regarding her status, Sterling on several occasions attempted to contact her, but was unsuccessful. Jt. App. 70-73. By letter dated November 14, 1995, Sterling notified Hicks of its intent to process her

resignation for failure to either return to work or to contact Sterling with a date when she would be able to return to work. Jt. App. 78. Hicks took no action to return to work. Jt. App. 71. Thus, effective November 14, 1995, Sterling terminated her employment.

On or about November 15, 1995, Hicks filed a claim for unemployment compensation benefits. Jt. App. 75. There were several unemployment compensation hearings, which included sworn testimony by Sterling representatives and Hicks. Jt. App. 63-75, 147-155, 205-217, 286-292. During the unemployment compensation proceedings, Hicks testified under oath that she had 12 weeks of leave and that she was medically unable to return to work at the end of her leave on October 30, 1995 due to problems with childbirth. Jt. App. 65-66, 74-75, 13. Hicks also testified that she visited her physician on December 6, 1995 and it was at that time that she was released to return to work. Jt. App. 68, 75. Because the relevant facts in the instant case have been established by Hicks's sworn testimony, in that she testified she had 12 weeks of leave and she was unable to return to work upon expiration of her leave, as a matter of law, Sterling's termination of her employment did not violate the FMLA.

The course of the proceedings in this case and disposition below are as follows. On or about July 15, 1997, Hicks filed a complaint against Sterling in the Circuit Court of Jefferson County, Commonwealth of Kentucky, seeking relief under the FMLA. Jt. App. 12-14. Upon Sterling's Notice of Removal, the case was removed to the United States District Court for the Western District of Kentucky at Louisville ("district court"). Jt. App. 3. On August 6, 1997, Sterling filed its Answer to Hicks's Complaint. Jt. App. 3.

On September 1, 1997, there was a Pre-Conference Planning Meeting, in which both parties participated, wherein it was determined that 180 days would be allotted for discovery. Although certainly permitted to do so, Hicks conducted no discovery during this time period. However, contrary to Hicks's contention in her Petition for Writ of Certiorari ("Petition") at p. 4, there was discovery conducted prior to Sterling's motion for summary judgment. Sterling obtained transcripts and documents from Hicks's unemployment compensation proceedings. Sterling utilized, in part, Hicks's sworn testimony given during her unemployment compensation hearings when it filed and re-filed its motion for summary judgment. Jt. App. 63-75, 147-155, 205-217, 286-292.

On October 6, 1997, Sterling filed a Motion for Summary Judgment. Jt. App. 3. On February 11, 1998, the district court issued a Memorandum Opinion and Order granting Sterling's Motion for Summary Judgment. Jt. App. 4, 163-167. The district court ruled that Sterling did not refuse to grant 12 weeks of leave to Hicks, nor did it discourage her from taking leave, and thus, Sterling did not violate Hicks's rights under the FMLA. Jt. App. 166-167.

Subsequently, upon consideration of Hicks's motion to alter, amend or reconsider the granting of summary judgment to Sterling, on April 3, 1998, the district court set aside summary judgment and allowed an additional 90 days for discovery on one limited issue. Jt. App. 173-176. That issue was whether Hicks voluntarily took FMLA leave from August 8, 1995 to October 31, 1995, or whether she was required to take leave at that time by her employer. Jt. App. 173-176. On June 1, 1998, the district court issued another Order allowing the parties 90 days from the date of the

June 1, 1998 Order (until August 31, 1998) in which to conduct discovery. Jt. App. 177-178.

On September 1, 1998, Sterling re-filed its Motion for Summary Judgment. Jt. App. 6. On October 22, 1998, the district court again granted Sterling's Motion for Summary Judgment, dismissing the action with prejudice. Jt. App. 19-22, 23. The district court found that it was irrelevant whether Hicks requested to be placed on FMLA leave or whether Sterling placed her on FMLA leave because under the FMLA, Sterling was not prohibited from placing Hicks on FMLA leave. Jt. App. 22.

On or about November 20, 1998, Hicks filed an appeal to the United States Court of Appeals for the Sixth Circuit ("Court of Appeals"). After submission of briefs and oral argument, on July 17, 2000, the Court of Appeals issued its opinion affirming the district court's order granting summary judgment for Sterling. Pet. App. 2a.[2] The Court of Appeals ruled that it was not necessary to address whether Sterling could place Hicks on FMLA leave "because Hicks's failure to return to work within 12 weeks of even her proposed leave date[3] precludes recovery under the Act." On July 28, 2000, Hicks filed a petition for panel rehearing. On August 22, 2000, the Court of Appeals denied Hicks's petition for panel rehearing. Hicks now petitions for writ of certiorari.

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2. All citations to Pet. App. __ are references to the Appendix contained in Hicks's Petition for Writ of Certiorari.

3. Throughout this case, Hicks has asserted that her leave should have begun on September 4, 1995, the date of her baby's birth. However, as the Court of Appeals correctly ruled, even beginning Hicks's leave on her proposed date she still could not have returned to work at the end of 12 weeks.

REASONS FOR DENYING THE WRIT

I. Considerations Governing Review On Writ Of Certiorari

This case is not one in which certiorari should be granted. The instant action does not meet any of the general criteria set forth in SUP. CT. R. 10. "A petition for writ of certiorari will be granted only for compelling reasons." *Id.* Further, a "petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or misapplication of a properly stated rule of law." *Id.* Hicks's Petition is based on the arguments that the Court of Appeals supplied facts and made erroneous factual findings and that there is an important principle of law at issue.

First, Hicks contends that the courts below supplied facts from evidence not specifically listed in FED. R. CIV. P. 56. ("Rule 56"). The argument is meritless because it is contrary to law. (See discussion *infra* at pp. 9-10). Hicks contends that by supplying facts, the Court of Appeals made erroneous factual findings, apparently because the court did not adopt her version of the facts. (Petition, p. 6). However, Hicks's version of the facts is not supported by the evidence of record. To the contrary, the material facts as set forth by Sterling are supported by the evidence of record, and the courts below so ruled. Most importantly, even if there were erroneous factual findings, which there were not, such is not a basis on which certiorari should be granted. A writ of certiorari will not be granted to review evidence or inferences drawn from the evidence. *General Talking Pictures Corp. v. W. Elec. Co.*, 304 U.S. 175 (1938). The decision by the Court of Appeals is not to be disturbed unless plainly without support. *United States v. Chem. Found.*, 272 U.S. 1 (1926). Certiorari

should be denied when the decision of the Court of Appeals is a fair assessment of the record because the Supreme Court does not grant a writ of certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220 (1925).

Second, the principle that under the FMLA an employer may place an employee on FMLA leave is a principle supported by the FMLA regulations, case law and the United States Department of Labor. Although Hicks argues that an employer may not place an employee on FMLA leave, she does not supply any legal authority to support her argument. Rather, Hicks argues this is an "important issue" and references a law review article. This Court does not sit to satisfy a scholarly interest in issues or sit for the benefit of particular litigants. *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70 (1955). Because the Court of Appeals concluded it was unnecessary to do so, the principle was not applied by that court. More importantly, even if the Court of Appeals had applied the principle, an asserted misapplication of a stated rule of law is not a reason for granting a writ of certiorari.

This case also does not meet any of the specific criteria set forth in SUP. CT. R. 10(a-c). The Court of Appeals has not entered a decision in conflict with a decision of another United States court of appeals. SUP. CT. R. 10(a). A decision by a state court of last resort is not involved. SUP. CT. R. 10(b). Nor does this case involve the situation where the Court of Appeals has decided an important question of federal law that has not been, but should be, decided by this Court, or has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10(c). Hicks's arguments are not compelling reasons for which a petition for writ of certiorari

should be granted, because they are contrary to law, and contrary to the considerations governing review on certiorari. Accordingly, applying the governing considerations for granting a petition for writ of certiorari to Hicks's Petition, it is clear that the Petition should be denied.

II. The Courts Below Properly Granted Summary Judgment For Sterling Based On The Summary Judgment Standard, Permissible Evidence, And The Law

A. The Summary Judgment Standard

Celotex Corp. v. Catrett, 477 U.S. 317 (1986), establishes the respective burdens of proof between a party moving for summary judgment and the non-movant. The movant has the initial burden of showing the absence of a genuine issue of material fact, but the movant is not required to support its motion with affidavits or other materials negating the non-moving party's claim. *Id.* at 323. However, the non-moving party must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* at 324.

When a motion for summary judgment is made and supported as provided by Rule 56, an adverse party may not rest on the mere allegations or denial of the pleadings, but the adverse party's response by affidavits or otherwise provided by Rule 56 must set forth specific facts showing that there is a genuine issue for trial. *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146 (6th Cir. 1995). If the adverse party does not so respond, summary judgment shall be entered against her. Hicks did not present affirmative evidence of

record to support her factual allegations. Thus, she could not defeat Sterling's Motion for Summary Judgment, and the courts below so properly ruled.

B. Permissible Evidence Under The Summary Judgment Standard

Hicks argues that the courts below improperly supplied facts from evidence not included in the forms of evidence set out in Rule 56. Hicks also contends that the Court of Appeals supplied facts which are contrary to her version of the facts. (Petition, p. 6). Hicks specifically asserts that the Court of Appeals improperly made factual findings based on excerpts from transcripts of Hicks's testimony given during the unemployment compensation proceedings. The argument is legally incorrect. The forms of evidence noted in Rule 56 are not the exclusive ways for presenting evidence in a summary judgment proceeding. *Duffee By and Through Thornton v. Murray Ohio Mfg. Co.*, 896 F. Supp. 1071 (D. Kan. 1995). *See also* 10A Wright, Miller & Kane, Federal Practice And Procedure: Civil 3d § 2721, *et seq.* at 361 (1998). There are a variety of materials not expressly mentioned in Rule 56 that a federal court may consider on a summary judgment motion. *Id.* § 2724.

In *Duffee*, the Court held that a sworn statement was proper material on which a court may base the granting of summary judgment. Likewise, in *Reed v. Aetna Cas. & Sur. Co.*, 160 F.R.D. 572 (N.D. Ind. 1995), the Court ruled that a sworn statement was admissible as summary judgment evidence. The Court in *Reed* explained that particular forms of evidence listed in Rule 56 are not the exclusive means of presenting evidence to support a summary judgment motion. The court stated that a "court may consider any material

that would be admissible or useable at trial." *Id.* at 574. *See also Horta v. Sullivan* 4 F.3d 2 (1st Cir. 1993) (in addition to those items listed in Rule 56(c) a court may take into account any material that would be admissible or useable at trial); *Curnow By and Through Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991) (in deciding a Rule 56(c) motion, the district court properly considered a statement because the statement was given under oath).

In sworn testimony during the unemployment compensation proceedings, Hicks admitted that she took the 12 weeks of leave and at the end of the 12 weeks of leave, she was medically unable to return to her position with Sterling. Jt. App. 65-68. She also testified that she was not released by her physician to return to work until December 6, 1995. Jt. App. 75. The law is clear that under Rule 56, Hicks's sworn statements are permissible factual evidence on which to base summary judgment. Accordingly, the Court of Appeals did not "supply facts from documents not included in Rule 56" as Hicks contends. To the contrary, the Court of Appeals properly relied on Hicks's sworn testimony in its decision to affirm summary judgment for Sterling.

C. The Law

1. FMLA Leave Entitlement

Under the FMLA, an eligible employee working for a covered employer is entitled only to a *total* of 12 workweeks of leave during any 12-month period for *one or more* of the following:

> (A) *Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.*

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) *Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.* [Emphasis added].

29 U.S.C. § 2612(a)(1).

The applicable regulation states that an "eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12 month period for any one or more" of the qualifying reasons. 29 C.F.R. § 825.200(a). *See also Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238, 242 (E.D. Pa. 1994) (under the FMLA, an eligible employee is entitled to a *total* of 12 workweeks of leave during any 12-month period for *one or more* of the qualifying reasons); *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1034 (M.D. Tenn. 1995) (the FMLA establishes the right of an eligible employee to take *up to* 12 weeks of leave during a 12-month period for *one or more* of the qualifying events). As a matter of law, an employee entitled to leave under the FMLA is limited to a total of 12 weeks of leave for a combination of any of the qualifying reasons provided for under the Act.

Under the FMLA, upon return from leave, whether utilizing a portion or the entire 12 weeks of leave,

an employee is entitled to be returned to the same position the employee held when leave began or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment. 29 U.S.C. § 2614(a)(1); 29 C.F.R. § 825.214(a). The applicable regulation provides that "if the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuance of a serious health condition, the employee has no right to restoration to another position under the FMLA." 29 C.F.R. § 825.214(b). Hicks admitted that she was granted 12 weeks of leave. Jt. App. 67. During the unemployment compensation hearing, Hicks testified that ". . . I had a 12-week leave." Jt. App. 67. As such, Hicks was not entitled to any additional FMLA leave. Hicks also testified that she was not medically able to return to work until December 6, 1995. Jt. App. 68, 75. By that time, her entitlement to leave had ended along with her entitlement to job restoration.

Federal courts have granted summary judgment in cases with facts analogous to the facts in the instant action. In *Cormier v. Littlefield*, 112 F. Supp.2d 196 (D. Mass. 2000), the court ruled that the employer was not required under the FMLA to hold open an employee's position beyond the 12 weeks of FMLA leave when at the end of the leave, the employee was unable to return to work. Relying upon the applicable FMLA regulation, 29 C.F.R. § 825.214(b), the court granted the employer's motion for summary judgment because after 12 weeks of leave the employee was not released by his physician to return to work. The court found that the employee was discharged on January 9, 1997, and that he was not released to return to work until January 27, 1997, several weeks beyond the 12 week period. Thus, the court ruled that the employee did not have a viable

FMLA claim against the employer. *See also Voskuil v. Envtl. Health Center-Dallas*, No. 3:96-CV-0683-D, 1997 WL 527309 (N.D. Tex. 1997) (because the former employee could not produce evidence that she was capable of performing her job at the end of her leave, she had no right to restoration to another position and she could not resume her former position, thus her job restoration rights under the FMLA ceased upon the expiration of her leave); *Beckendorf v. Shwegmann Giant Super Markets, Inc.*, No. 95-3822, 4 Wage and Hour Cas. 2d (BNA) 315, 1997 WL 191504 (E.D. La. 1997) (when an employee, at the conclusion of 12 weeks of FMLA leave, is unable to perform her job because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to a position under the FMLA).

Applying the statute, regulations and analogous case law to Hicks's situation, where it is established, via Hicks's own testimony, that she used her total 12 weeks of FMLA leave entitlement and was medically unable to return to her position at the end of her leave, it is clear, as a matter of law, that Hicks had no right to job restoration under the FMLA.

2. Hicks Misapplies The FMLA Cases Cited In The Petition

The FMLA cases cited by Hicks to support her position are distinguishable from the instant action. The employee in *Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591 (7th Cir. 1998), was terminated (for poor job performance) several days after she requested a leave. Thus, the factual situation in that case is in sharp contrast to Hicks's case because Hicks received a full 12 weeks of leave and was terminated when she was unable to return to work after

expiration of her leave. The employee in *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294 (4th Cir. 1998), returned to work prior to the expiration of his leave and the court found that the employer failed to restore him to his prior position. Again, the factual situation in that case is in contrast to Hicks's situation where the evidence establishes that Hicks could not return to work upon the expiration of her leave.

Hicks argues that her case is distinguishable from *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1998). Hicks is incorrect. In its opinion, the Court of Appeals cited *Cehrs* for the principle that the employer in that case did not violate the FMLA because the employee was unable to return to work within the 12 week FMLA leave period. The court in *Cehrs* explained that regardless of the proposed leave dates by the employer or the employee, the employee was clearly unable to return to work using either date. In Hicks's situation, the Court of Appeals found the facts and ruling of *Cehrs* highly analogous, because even if Hicks began her leave on her proposed date, September 4, 1995, her leave would have ended the last week of November 1995, which was, by her own testimony, at least ten days before her physician released her to return to work.

3. Hicks Cannot Disavow Her Sworn Testimony By Asserting Collateral Estoppel Or By Attempting To Change Her Testimony

In her Petition, Hicks cites several cases to discuss the doctrine of collateral estoppel. Hicks argues that she is not collaterally estopped from raising factual issues in this case which were also raised in the unemployment compensation proceedings. (Petition, p. 8). Collateral estoppel is not a

relevant principle in this case.[4] The "*findings*" of the Unemployment Compensation Commission are not on review, nor have the findings ever been relied upon.[5] It is Hicks's sworn testimony given in the unemployment compensation proceedings that is being relied upon. The relevant legal principle is that Hicks cannot create issues of fact to defeat summary judgment by relating facts in contradiction of her previously sworn testimony. *Davidson & Jones Dev. Co. v. Elmore Dev. Co.*, 921 F.2d 1343, 1352 (6th Cir. 1991); *Reid v. Sears, Roebuck and Co.*, 790 F.2d 453, 460 (6th Cir. 1986). *See also Essick v. Yellow Freight Sys., Inc.*, 965 F.2d 334 (7th Cir. 1992) (former employee, in lawsuit against former employer, could not defeat summary judgment by contradicting his own prior sworn testimony given during administrative proceedings); *Margo v. Weiss*, 213 F.3d 55 (2d Cir. 2000) (a motion for summary judgment cannot be defeated with affidavits in contradiction of earlier testimony). Hicks has throughout this case attempted to change her factual story in contradiction of her previously sworn testimony given during the unemployment compensation proceedings. The courts below have properly used Hicks's sworn testimony for summary judgment purposes — the "*findings*" in the unemployment

4. Collateral estoppel is a principle that refers to issues and findings of fact, not sworn testimony. As applied to the instant action, the findings of fact entered in Hicks's unemployment compensation proceedings do not collaterally estop litigation of the issues in this case. *Bd. of Educ. v. Gray*, 806 S.W. 2d 400 (Ky. App. 1991). However, the principle does not apply to Hicks's sworn testimony.

5. In its February 11, 1998 Opinion and Order, the district court stated that there is no need to consider the doctrine of collateral estoppel, and as such, the court did not apply the doctrine. Subsequently, the doctrine was not applied by the district court or the Court of Appeals.

compensation proceeding have never been used, nor could such "findings" be used. Hicks states such in her Petition (at pp. 12-13), but, nonetheless, attempts to use the findings to support her argument. The references to the unemployment compensation proceedings Hicks cites in her Petition, except for one reference, are not to her testimony. Rather, Hicks references the referee's questions and the referee's and commission's "findings." The only reference to Hicks's testimony is the excerpt in her Petition on p. 11, where she admits she was not released to return to work by her physician until December 6, 1995. Application of the doctrine of collateral estoppel is simply not relevant to this case.

Hicks further asserts that her sworn testimony given during the unemployment compensation proceedings was for one purpose, which was for obtaining unemployment compensation benefits. (Petition, p. 13). Hicks's contention, taken to its logical conclusion, appears to assert that her testimony given under oath during the unemployment compensation hearing was given to suit that purpose. However, when needed to provide the facts for this case, her factual story would be different. Hicks appears to be arguing that her factual story may change to establish whatever facts are necessary to support her present claim. Her attempts to create facts to suit her need demonstrates the lack of evidence in the record to support her allegations.

Hicks further contends that there is nothing in her medical records which indicates that she was unable to return to work before December 6, 1995. (Petition, p. 10). More important is the fact that there is nothing in the medical records which indicates that Hicks could have reported to work prior to December 6, 1995. The mere inference of an issue of fact will not defeat a summary judgment motion.

Celotex. Rather, Hicks must have demonstrated, by affirmative evidence of record, that issues of material fact existed. She failed to do so. Her attempts to create issues of fact are in contradiction of her previously sworn testimony. Her latest assertion is that a jury could find that she answered a different question from the one the referee asked regarding the date she was released to return to work (Petition, p. 13). The assertions are directly contrary to the standard for granting summary judgment. Moreover, such assertions are not reasons for which this Court should grant review of the case.

III. An Employer May Place An Employee On FMLA Leave

A. The Principle Is Legally Valid

The principle that an employer may place an employee on FMLA leave is a principle supported in the FMLA regulations, case law and by the United States Department of Labor. Although disavowing the principle, Hicks offers no legal support for her argument. Rather, she references a theoretical law review article on the Pregnancy Discrimination Act.[6] The article, in presenting an academic review, actually supports the Court of Appeals ruling in that the article correctly states that the FMLA provides only 12 weeks of leave.

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6. Hicks's reference to the Pregnancy Discrimination Act is not appropriate. The Pregnancy Discrimination Act has never been asserted in this case. A contention not made in the district court or in the Court of Appeals will not be considered by the United States Supreme Court. *Virtue v. Creamery Package Mfg. Co.*, 227 U.S. 8 (1913); *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

More importantly, whether an employer may place an employee on FMLA leave was not addressed by the Court of Appeals because the court found it unnecessary to do so. Even if the principle had been addressed, the principle is legally valid. As such, it is one which should not be reviewed by this Court. Sterling could not locate any cases which are in conflict with the principle. Thus, it is not "an important issue which needs to be settled by this court," as Hicks asserts in her Petition. (Petition, p. 17). Nonetheless, the principle is reviewed below.

In *Love v. City of Dallas*, No. 3:96-CV-0532-R, 1997 U.S. Dist. LEXIS 21982 (N.D. Tex. 1997), employees sued their employer asserting violations of the FMLA, because their employer "involuntarily" placed them on FMLA leave without their request. The employees in *Love* claimed that nothing in the text of the statute or regulations allows an employer to involuntarily place an employee on unpaid FMLA leave. The court in *Love* stated that "more relevantly, nothing in the statute prohibits an employer from doing so." *Id.* at *17. The court ruled that there is nothing in the FMLA statute itself or the regulations to prohibit an employer from placing employees on FMLA leave during the first 12 weeks of leave. Accordingly, the court granted summary judgment in favor of the employer and dismissed the employees' FMLA claims.

Harvender v. Norton Co., No. 96-CV-653, 1997 U.S. Dist. LEXIS 21467, 4 Wage and Hour Cas. 2d (BNA) 560 (N.D. N.Y. 1997), is another case with the same holding as in *Love*. In *Harvender*, the employee became pregnant and was told by her physician that her due date was in late September 1996. The employee informed the employer that she was pregnant and notified her supervisor of her baby's

due date. The employee's physician advised her that she should not be working with chemicals which was a primary part of her job. The employee believed that she would be placed on a light duty program by the employer as she had been during a previous pregnancy. However, when the employer notified the employee that she was being placed on 12 weeks of FMLA leave, the employee protested claiming that she never requested the leave and objected to being placed on FMLA leave.

The *Harvender* court ruled that "there is no right under the FMLA to bring an action against an employer for placing an eligible employee on leave." *Id.* at *16. Although the employee argued that she did not request to be placed on FMLA leave, the court ruled that such an argument by the employee was irrelevant. The court stated that "the Act does not require a request by an employee in order for that employee to be placed on FMLA leave." *Id.* at *22. The court further stated that "nowhere in the Act does it provide that FMLA leave must be granted only when the employee wishes it to be granted." *Id.* at *21. The court held that the employer provided the requisite 12 weeks of leave and was not obligated to provide anything else under the Act. Accordingly, the court in *Harvender* granted the employer's motion for summary judgment and dismissed the employee's FMLA claim. *See also Moss v. Formosa Plastics Corp.*, 99 F. Supp.2d 737 (M.D. La. 2000) (the court ruled that the employer's placing the employee on leave did not violate the FMLA statute or regulations, thus, the employer was entitled to summary judgment as a matter of law on the employee's FMLA claim).

In addition to the applicable case law, the United States Department of Labor has issued several FMLA opinion

letters wherein the Department of Labor has unequivocally stated that an employer may designate and count an absence against the employee's 12 week FMLA leave entitlement even if the employee has not requested that it be counted as such. *See* Department of Labor Opinion Letter – 83, August 7, 1996 (the employee may not "bar" the employer from designating any qualifying absence as FMLA leave); Department of Labor Opinion Letter – 68, July 21, 1995 (the employer may designate, and so advise the employee, and count an absence against the employee's 12 weeks of FMLA leave entitlement even if the employee has not requested that it be counted as such). Jt. App. 281-283, 284-285.

Hicks argues that her leave should have begun only on the date she proposed, September 4, 1995, to care for her newborn child.[7] Hicks is incorrect. As a matter of law, Sterling was not prohibited from designating Hicks's leave as FMLA leave when she notified Sterling on August 8, 1995, that she was hospitalized for a kidney infection. Hicks did not submit to Sterling any documentation that she was able to return to work following her hospitalization, nor did she return to work. The Court of Appeals found that the record was devoid of such evidence. Pet. App. 3a. Most importantly, Hicks's testimony confirms the dates of her leave. She testified that she began leave on August 8, 1995, and was not released by her physician to return to work until December 6, 1995. Jt. App. 65-66, 68, 74-75.

The plaintiffs in *Love* were placed on FMLA leave because they were unable to perform their jobs. At no time

7. Hicks asserts in her Petition (p. 6) that her baby was born on September 5, 1995. However, her Complaint (Pet. App. 40a) and her Affidavit (Pet. App. 37a) state that her baby's birthdate is September 4, 1995.

subsequent to Hicks's hospitalization did Hicks make any attempt to return to work. She testified that her leave commenced August 8, 1995, and that she was unable to return to work until December 6, 1995. Jt. App. 65-66, 68, 74-75. Applying the case law and Department of Labor opinion letters to the instant action, it is clear that Sterling was permitted to designate Hicks's leave as FMLA leave.

B. The Court Of Appeals Correctly Ruled That It Was Unnecessary To Address The Principle

The Court of Appeals concluded that regardless of whether the leave date proposed by Hicks or Sterling applied, using either date, Hicks's failure to return to work before December 6, 1995 precluded recovery under the FMLA. Thus, the Court did not address Sterling's right to place Hicks on FMLA leave. Hicks has asserted throughout this case that her FMLA leave should have begun on September 4, 1995, the date of her child's birth. Jt. App. 103-104. Assuming *arguendo* that Hicks had the right to choose the date of her FMLA leave (which she does not, as a matter of law), beginning the leave on September 4, 1995, her 12 weeks of FMLA leave entitlement ended on November 24, 1995. Hicks has admitted she was unable to return to work at that time. Jt. App. 65-66, 68, 74-75. Even assuming Hicks's FMLA leave did not begin until September 11, 1995, the date of Sterling's letter, she still used 12 weeks of FMLA leave prior to December 6, 1995, the time she was released by her physician to return to work. Jt. App. 65-66, 68, 74-75. Beginning Hicks's leave from September 11, 1995 and counting 12 weeks forward, her FMLA leave expired on December 1, 1995. Thus, counting Hicks's FMLA leave from the beginning date she proposes, September 4, 1995, or at

the very latest from the date of the September 11, 1995 letter, Hicks still used all of the 12 week FMLA leave entitlement and could not return to work upon expiration of the leave.

As such, Hicks's argument that an employer may not place an employee on FMLA leave is not a decisive legal issue in this case. The decisive legal issue, as correctly determined by the Court of Appeals, is that Hicks used all of the 12 week FMLA leave entitlement and could not return to work upon expiration of that leave. Hicks's FMLA job protection ended when she could not return to work on October 31, 1995. Even assuming *arguendo* the FMLA leave began on September 5 [sic], 1995 as she asserts, Hicks's 12 week FMLA leave expired before she was released by her physician to return to work. No matter what extraneous arguments Hicks attempts to make, she cannot change the law. Twelve weeks of FMLA leave entitlement is just that, 12 weeks. Accordingly, this case raises no significant issues that warrant this Court's review.

CONCLUSION

Based upon the foregoing discussion, Sterling respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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